No. 2761.

IN THE

CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

ROD D. LEGGAT,
Appellant,

vs.

CHARLES D. McCLURE,
Appellee.

BRIEF OF APPELLEE.

Appearances:

GUNN, RASCH & HALL,

MAURY, TEMPLEMAN & DAVIES,
Solicitors for Appellee.

MC KEE PTG. CO., BUTTE

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ADDITIONAL STATEMENT OF THE CASE.

We do not feel that the statement of the case made by the appellant is sufficiently full to correctly present the cause to the court.

Quoting from the bill of complaint, such matters as were found to be true by the lower court we add as a portion of our statement.

McLure was a citizen of Missouri, Leggat a citizen of Montana. The amount involved, exclusive of interest and costs is more than $3,000.00, to-wit: it is more than the sum of $148,000.00; that on April 18, 1913, McLure was seised in fee simple absolute of a three-quarters interest in the Eastern, three-eighths interest in the Ouichita; one-half interest in the Elvina, and one-sixth interest in the Bland quartz lode mining claims in Silver Bow County, Montana.

Paraphrasing the complaint:

That on April 18, 1913, a judgment was rendered against McLure by Wight and others for $964.65. Execution was issued on May 14, 1913, for such sum. The sheriff of Silver Bow County, wherein the property lay, levied upon and seized McLure's four separate and distinct parcels of land under the said execution, and advertised them for sale for June 6, 1913.

That at all times since January 1st, 1913, the interest of McLure in the said claims was and is of the reasonable value of $150,000.00.

That there had existed between McLure and Leggat during a period of thirty years a warm friendship, confidence and mutual trust; that they had been repeatedly during said thirty years engaged as co-partners in many mining ventures, and the operation of many mines, and the buying and selling of mines together as joint owners and tenants in common, and at the time of the sale defendant was co-owner in each and all of the said four patented mining claims with plain-

tiff.....That he (defendant), owned the other one-half interest in the Elvina beside the one-half owned by your orator. (Statement that he owned in the other claims an undivided interest proved to be inaccurate.)

(There are several inaccuracies in the bill, due to the fact that the bill was drawn as appeared in the record on telegraphic instructions from St. Louis, where the plaintiff was at the time of the filing of the bill, to his attorneys in Butte).

Paraphrasing further from the bill:

On June 6, 1913, while McLure had great and valuable mining properties, the titles to which were otherwise clear save and except for the said judgment, yet your orator had no cash on hand (this was inaccurate; he had sufficient in bank to pay the judgment); and on the said day he requested the defendant to become a purchaser at the said sale, and hold the title if any were subsequently obtained by the defendant as a mortgage to secure the amount that might be bid by the defendant at the said sale in payment and satisfaction of the judgment and execution.....And the said defendant agreed with your orator that he would bid an amount equal to the judgment as to principal, interest and accruing costs and expenses of sale when the sheriff should offer the said real property above described for sale at the said time.....And the defendant did bid pursuant to his agreement with your orator to hold the said title as security for his bid,

the sum of $1,004.15, and no greater sum; and thereafter at many times between the 6th day of June, 1913, and the period of redemption of one year allowed by law and statutes in Montana your orator was able to redeem the said above described property, and was willing to do so, and signified his intention and desire to do so to the defendant; that the defendant informed your orator repeatedly that after the period of one year might expire provided there were no redemption he would hold any title that might be obtained by reason of the expiration of time merely as a mortgage to secure the re-payment from your orator of the sum of $1,004.15, and interest thereon at the rate of 8% per annum from the 6th day of June, 1913, until the same should be repaid, and promised and agreed with your orator before the expiration of the said period of redemption, to-wit, June 6, 1914, that if your orator at any time after the said 6th day of June, 1914, would re-pay to the defendant the sum of $1,004.15, together with interest at the rate of 8% per annum, he would re-convey to your orator all of the real property .....Your orator relied upon the said promise and agreement, and due to such reliance upon such agreement, and the trust and confidence reposed by your orator in the said defendant, the said trust nurtured and raised up by thirty years of intimate acquaintance and business dealings and co-partnership in mining ventures, and in the owning of mining properties, and for no other reason your orator allowed the period of redemption, to-wit, one year from the 6th day of June,

1913, to expire without effecting a redemption of any of the property hereinbefore described.

AMENDMENT TO BILL.

That on August 10, 1912, plaintiff loaned defendant $500.00; that no part of the same had ever been paid on the date of the sale.....So that, the actual consideration of said bid by the defendant was only $504.15.

Further, of the original bill—

That on the 6th day of April, 1915, your orator offered to re-pay to the defendant the sum of $1,004.15, together with interest thereon, etc., and requested and demanded a reconveyance, etc. That plaintiff is now ready and willing, and hereby offers to pay the said sum provided the defendant will re-convey.

That the sheriff, on the 11th day of June, 1914, made and delivered a deed to the defendant, a copy of which was put forth as an exhibit; that the consideration of the said deed is wholly and grossly inadequate, and in great disparity with the actual value of the property therein, and the said deed was obtained by reason of the trust reposed in the promise and agreement of defendant made to re-convey at any time to your orator the said lands, upon the payment of the said amount of money; that the same constitutes a cloud, etc.; that the said property and all of the same, though consisting of four separate and distinct parcels of land, and your orator's interest in any one piece would have brought, had your orator sought bidders, the amount of the said judgment; that all of the

same was sold in one parcel, and so that nothing like their full value could be realized; that there were no bidders present at the said sale but the defendant, and no other persons present but your orator, the defendant, the sheriff or his deputy, and one of the plaintiffs; that your orator is a man very much advanced in years, to-wit, of approximately the age of seventy years, and during the last two years has suffered much from failing health and sickness.

Followed by the prayer. Sworn to by one of the complainant's solicitors.

The answer set forth certain small counterclaims of moneys loaned which were allowed in the decree.

The court found that all of the allegations of the complaint are true; that all the allegations of the answer of the nature of counterclaim are true. Therefrom the court concludes that the plaintiff is entitled to recover of and from the defendant the interest in the mining claims set out in the complaint and claimed by him, together with the $500.00 loaned; that the defendant is entitled to recover from plaintiff certain small items of moneys advanced, and the sum of $1,004.15, the amount of the bid, with interest.

The court finds other specific allegations to be true, among which, that the defendant bid pursuant to agreement; that plaintiff was led to believe by defendant that he need not redeem within the time fixed by statute in conventional cases, and he relied thereon, and acted accordingly; that the statutory time expired, and thereupon the defendant claimed the property was his,

and refused redemption; that the property was and is worth above $100,000.00; that very intimate and confidential relations had existed between the parties for thirty years. 25 R. 1 to 27 R. 10. Decree accordingly, 27 R. 10 to 29 R. 20.

SUMMARY OF THE EVIDENCE.

THE FACTS ABOUT WHICH THERE CAN BE NO DISPUTE.

1. In the case at bar there is between the actual value of the land sold and the price paid by Mr. Leggat a larger difference than can be found in any case accessible to us if reported up to date. The property sold,—the interests in four patented mining claims, has the following *indicia* of value. Within one year previous to the sale the Eastern alone had been subjected to an option for eighteen months at the princely sum of $200,000.00, of which $20,000.00 had been paid down in cash. The price to be paid for the three-quarters thereof involved in this suit was $150,000.00, of which $15,000.00 was paid down in cash. 43 R. 1 to 48 R. 10.

The option did subsequently lapse, but was in force when the sale took place, and pending the option we have the sworn statement of MR. LEGGAT that the inchoate right of dower of Mrs. McLure, the wife of the complainant (then of the age of sixty-eight, and in feeble health), was worth $40,000.00. 85 R. 1 to 88 R. 30. *When the sale on execution was made* $50,-

000.00 *had been paid and the option was still in force.* 83 R. 10 to 30.

Exhibit D. of the plaintiff: 85 R. 1 et seq. On July 31st, 1912, Rod D. Leggat signs an appraisal after an oath that he would truly and fairly appraise the inchoate right of dower of Mrs. Charles D. McLure in the Eastern, the Bland and the Ouichita. He values the inchoate interest in the three-fourths of the Eastern at $25,000.00; the inchoate interest in the one-sixth in the Bland at $12,500; the inchoate interest in three-eighths in the Ouichita at $2,500.00. A few weeks before suit was brought McLure was offered $40,000.00 cash for two of the interests. 170 R. 10.

FACTS SHOWING AGENCY AND GREAT PRETENDED AFFECTION AND VALUE OF THE LAND, AS TAKEN FROM THE LETTERS OF MR. LEGGAT.

Many letters from Mr. Leggat to Mr. McLure were introduced in evidence. We select some excerpts from them. They date over a period of thirty years.

"So you will please let me carry it through at your *dictation.* (Exhibit 23, 167 R. 20, letter from Leggat to McLure, Jan. 4, 1912). This was concerning the negotiations to sell these lands to Wolvin and Hayes.

Exhibit No. 6, 127 R, begins "My dear old Solomon"; a species of undeserved, though possibly not unwelcome flattery, which is found in many of the letters from Mr. Leggat to Mr. McLure. (And likewise frequently in Timon of Athens.) The letters usually com-

mence "My dear Charlie", though in exhibit 8, 132 R., Feb. 10, 1907, we find "My dear old Boy". Exhibit 1, 118 R., Aug. 24, 1909, Mr. McLure is greeted "My dear old true Friend". Exhibit S, 105 R., Oct. 24, 1907, Mr. McLure has become "My dear good true Charlie". The superlative seems to have been reached in exhibit G., 103 R. It commences "My dear true old friend Charlie". Exhibit Q proceeds "You are a hold fast good and true. Good Scotch blood in one's vein's tells of the stock they spring from." (There seems to be a little canny Scotch blood on defendant's side of this case.)

In exhibit B, 46 R., June 7, 1907, Mr. Leggat assumes the lofty role of one who would swear to his own hurt and change not, and who loveth his neighbor as himself. He says: "I thoroughly understand the situation and how Ford and I guess others have tried to steal and do you wrong. I've got no use for a faithless or ungrateful wretch of a man and what I can do to make them do square and straight in all things shall be done by me." Exhibit P, 107 R., June 7, 1907.

As early as Feb. 2, 1905, Mr. Leggat assumed to act as the agent for Mr. McLure. In exhibit F, 90 R., he says: "I have given a verbal lease to a couple of good men on the Eastern, and if they find anything I agree to give them a written lease for the year, 25% royalty. I offered him a one or two year lease 25% royalty", etc.

In Exhibit H, 93 R., May 2nd, 1905, Mr. Leggat

becomes the confidential adviser of Mr. McLure: "As the parties want to go east to see what they can do, I wish you would give me the figures that we ought to put on the Eastern." "I think sixty thousand to seventy-five would be about right for I would like to take now for my interest at the rate of 25 or 30,-000 per claim. There is no work being done in the vicinity. Nearest is at the Black Rock, southeast of the Eastern." This letter is also interesting as showing the value which Mr. Leggat then put on the claims. It was in no public appraisal where some purpose might exist to influence buyers, but in a private letter between two men who treated their correspondence with secrecy.

In Exhibit R, 104 R., October 18, 1907, we find Mr. Leggat accepting the position of confidential adviser to Mr. McLure about this ground. We quote:

"Now in yours of the 14 you leave it to my judgment to sell and let them develop the Bland. Now Charlie this rather puts me in a position of an adviser as to what you should do with your own."

As early as June 9, 1905, exhibit 1, 94 R., we find Mr. Leggat acting as the agent in fixing the price of the Eastern (certainly a most important part of the management of a mining claim): "I put the price on the Eastern at 110,000, ten per cent to be paid in six months, bal. in one year. You have some stock in the Combination M. & M. Co. that should be transferred to me."

On January 15, 1906, exhibit J, 96 R., Mr. Leggat

acts as agent for the Elvina lode claim, which then stood in the name of Mr. McLure, and was owned actually by the plaintiff and defendant in equal half interests:

"I have leased the Elvina lode claim. The parties want also a bond. This I promised them, but said I would have to consult with you as to the figures."

Again in this exhibit there comes to surface that hard to hide, true, deep affection, a little linguistic jewel. It reads as a letter laid away, in lavender, from a lovelorn lass to a sweetheart on the battle line. The exhibit ends up "For I do long to see you."

There are other bursts of quiet flattery in this lengthy correspondence,—instance exhibit K, 97 R., Feb. 4, 1906:

"Your photograph came in splendid condition this evening, and we are all very much pleased to get it. Wife and Stewart wants it framed right off, so I expect it will be placed in the most conspicuous position in the house. It really is a very good one of you and resembles very much the last 'Lord Provost' of Edinboro that I had the honor of meeting, so there."

Another burst of esteem is found in Exhibit M, 99 R., July 6, 1906: "My dear good old friend: Glad that you are thinking of bringing some of "Clan McLure" with you for their ancestors always thrived in the "Hieland" and it is the place of freedom for them."

This little gem also is found at the close of this exhibit. One might expect it in the sentimental journey of Lawrence Stearn, the flusher of the tear duct:

"With best wishes," etc.

In exhibit L, 98 R., March 30, 1906, we find defendant, then the local steward of the plaintiff investigating the record title of the plaintiff in the Ouichita lode:

"I ordered abstract to be made of the Ouichita lode claim.....The title stands as follows: Charles D. McLure 6-16; P. M. O'Donnell 3-16; Silas F. King 4-16, & Sweeney 3-16—16-16."

It is interesting to note that at that time Mr. Leggat himself did not own any interest whatever in the Ouichita, he could only have been acting for the plaintiff in his investigation.

On Nov. 29, 1906, Mr. Leggat in exhibit N, 100 R., again assumes the role of steward for the plaintiff. "Mr. Wilmot and myself went all over the Eastern, Bland, Ouichita.....I gave him the figures of all the interest you held."

In exhibit 7, 127 R., Jan. 2, 1907, we note a suggestion from the steward: "Just consider my suggestion as to you having power of attorney from Mrs. McLure as well as others, for if any deals are made it would save lots of delay."

On Jan. 28, 1907, exhibit 8, 130 R: "There has been several local parties wanting to tie up Eastern, Bland and Ouichita, but I gave them your direct ultimate terms and figures, and that just staggers them."

A sad echo of Mr. McLure's better days is found in exhibit 12, 137 R., April 8, 1893: "Have been very anxiously looking for draft from you so I could settle the Elvina accounts all up." The entire budget had

come to $90,000.00, all paid in by McLure to the firm of McLure and Leggat.

This being the tercentenary of Shakespeare's death, as our tribute to the wisdom of the immortal Bard, we insert:

> "Timon has been this lord's father,
> And kept his credit with his purse,
> Supported his estate; nay, Timon's money
> Has paid his men their wages; he ne'er drinks
> But Timon's silver treads upon his lip;
> And yet, O! see the monstrousness of man,
> When he looks out in an ungrateful shape,
> He does deny him, in respect of his,
> What charitable men afford to beggars."
>
> Act III., Scene II.

In exhibit 16, 141 R., Dec. 2, 1906, Mr. Leggat put the price on the Eastern and Bland at $200,000.00, twenty per cent. down, and to use his own language; "Did not bat an eye." In that he speaks again of "C. D. Mc wisdom and nerve."

From a literary standpoint exhibit 19, 144 R., is a classic denouncement of fraud and sharp dealing; nor is exhibit W, 112 R., of Jan. 5, 1906, an unworthy example. How charming it would be to receive the following from an old friend:

"Yours of the second with the new year greetings is at hand. I assure you that I sincerely appreciate the knowledge that you sometime think of your old friend which I do often of mine."

Nor does exhibit U, 108 R., May 7, 1908, lack in literary charm: "I was told by ———— Mrs. McLure is in bad health, which I am extremely sorry to hear. I do hope that ere this she has improved for I know her illness is a great strain on you. Hoping to hear from you soon, and with best wishes and love, I remain", etc.

To fully appreciate exhibit S. 105 R., forget "I think the lady doth protest too much," and then peruse:

"My dear good true Charlie: Tell you the truth, I have no use for a sneak or wishy washy man or wants to crowd the under dog. I guess you and I are alike in that. A square deal for the weak always if they are right."

It is indeed sad that our duty to our client demands that we refresh the court's mind with Byron's criticism of Stearns—"He abandoned to privation his living mother, and would shed tears over the carcass of a dead jackass."

In exhibit 10, 135 R., of May 25, 1907, is found the climax of invited confidence. An invitation is extended to a *cestui que trust,* who might deal in property worth hundreds of thousands of dollars. Mr. Leggat says to McLure:

"One thing I want distinctly understood. If there is any stock or interest transferred to my name I will on demand from you, transfer it at once back to you, so just keep this"—a continuing offer which, but for its

sad betrayal, would have been one of the tokens that in the modern world we had another friendship of Damon and Pythias.

Some say that in the cold science of the law such expressions of endearment are not to be considered. It is elementary that countless wills have been set aside by undue influence gained over unsuspecting old men through such letters and such protestations, and in a case from the Supreme Court, Whitney v. Hay, 181 U. S. 77, such letters, set out at length therein from an old couple to a young couple in no wise related by blood or marriage, were a part of the *res gestae* upon which the court based a decree declaring property worth $25,000 subject to an oral contract to convey.

In exhibit No. 21, 163 R., of date August 10, 1912, is found a reminder of the cowboy artist's, Charlie Russell's, great masterpiece, "The Last of Ten Thousand." (The picture sent to his employer, of the last steer dying in the storm.) It might be styled, however, "The Last of Seventy Thousand"—There had been a donation to Mr. Leggat from Mr. McLure of $45,000, one-half the expenses of operating the Elvina; a donation of $20,000, one-half the expense of operating the Chile and the McVey; a donation of $4,000 to Mr. Leggat, one-half the expense of operating by the two old cronies (when boys) in the Caldwell district.

We are not exaggerating when we call the check for $500.00 which Mr. McLure on August 10, 1912, gave to Mr. Leggat to take a trip back to St. Louis "The Last of Seventy Thousand."

Words fail the uninspired to draw a parable for this unjust steward. Mr. Leggat could owe Mr. McLure one-half of $90,000.00 on the Elvina transaction and it was called off and forgiven. Mr. Leggat could owe Mr. McLure one-half of $40,000.00 on the Chile and McVey transaction, and it was called off and forgiven. Mr. Leggat could owe Mr. McLure one-half of $8,000.00 on the Caldwell district transaction, and it was called off and forgiven. Mr. Leggat could owe Mr. McLure from August to June $500.00 for a pleasure trip, and not only the interest but also the principal was forgotten until after this suit was commenced.

Mr. McLure owed Mr. Leggat $504.15 from June 6, 1913, to June 6, 1914, and Mr. McLure must by reason thereof be stripped, as counsel would have us believe, of property worth from $150,000.00 to $250,000.00. The fruits of his early courage and labor, crossing the plains as a freighter. Shakespeare was cheated by having lived before this age; here was a better model for his Shylock than he ever knew.

In testing the veracity of these two men the court can find in the record facts showing their inner character. McLure's unheard of generosity through a period of thirty years shows him to be a man absolutely above being influenced as to his testimony by any love of money. "The ruling passion is strong in death."

While fortune has favored him with great riches, and also chastened him with great financial distress at times, yet in both wealth and poverty the same spirit of gen-

erosity and recklessness about money pervades his life. Probably the loan of $500.00 to his old friend to take a pleasure trip was a greater strain on his resources than the gift of the $45,000.00 in the Elvina transaction.

The Master born at Bethlehem lacked such good material for his parable of the Unjust Steward. The Chancellors will recall that the Lord of the House denounced the unjust steward in that while he himself had forgiven the steward a shortage of ten talents in his accounts, the steward had oppressed a third party who owed him one talent. In the instant case the unjust steward has been forgiven ten talents and he would treacherously strip his Lord and Master of all earthly possessions for a one hundred and fiftieth part of the ten talents.

TESTIMONY OF L. P. SANDERS.

41 R. Et Seq.

We commend Louis P. Sanders to the court as a witness entirely disinterested, of excellent memory without his documentary memorandum, and as accurate with his documentary memorandum as any witness who can ever come before the court. We aver that the court must look in vain for testimony superior in its credibility, fairness and freedom from bias. His testimony is relevant from two standpoints,—first, as to the value of the property, and second, and probably more important, as showing that Mr. Leggat was the confidential agent of Mr. McLure. We abridge the testimony of Captain L. P. Sanders (a member of this bar):

Captain Sanders was acquainted with the Eastern, the Ouichita and the Bland. In 1912, as a member of his law firm of Kremer, Sanders & Kremer, he did professional services for Messrs. Wolvin & Hayes, who were negotiating for a portion of the ground described in the bill. His negotiations, extending over quite a period, and prior to the first day of July, 1912, were entirely with Mr. Leggat fixing the price on Mr. McLure's interest. Mr. Sanders' recollection is in his own words:

> "Q. At that time did you have any negotiations directly with Mr. McLure?
>
> A. Not prior to the first day of July, 1912. My recollection is that I did not see Mr. McLure until subsequent to that time. Sometime prior to the first of July of that year I had a conference with Mr. Rod D. Leggat in behalf of Wolvin & Hayes' desire to secure an option on this claim,—a three-quarters interest as I recall it in the Eastern belonging to Mr. McLure.....The balance of the claim belonged to T. Stewart White and Mr. Rod D. Leggat. Mr. T. Stewart White, to my knowledge, was never in Montana during these negotiations. I had never seen him; nor was Mr. McLure either. Mr. Leggat advised me that the consideration for the Eastern under the option to Wolvin & Hayes was $200,000.00, ten per cent. of which was to be paid down simultaneously with the execution of the option, and deposited in the State Savings Bank of Butte, Montana. I inquired of Mr. Leggat as to the means of securing some conveyance or acquiesence in the option from the opposing owners, T. Stewart

> White and Mr. Charles D. McLure. At that time he told me substantially,—I cannot repeat the exact language—but he told me substantially that he was handling the matter for T. Stewart White and Charles D. McLure, and that they would be satisfied with whatever he did with reference to this ground."

Mr. Sanders then produces plaintiff's exhibit "A" not signed by Mr. White; not signed by Mr. McLure; signed by L. P. Sanders as Agent for Wolvin & Hayes; and signed by Rod D. Leggat, and therein "Rod D. Leggat agrees to sell to A. B. Wolvin and John M. Hayes, all of the Eastern quartz lode mining claim, Survey No. 1230, situate in Silver Bow County, Montana, total purchase price $200,000.00, if the option be exercised, payments thereof as follows: Ten per cent. on July 1st, 1912", etc.

And quoting further from the agreement: "Leggat agrees that he will cause to be made and executed good and sufficient deed of conveyance to Wolvin & Hayes, or their assigns to all of the Eastern lode claim free and clear of the incumbrances and dower rights." It is further recited in this agreement, "Others besides Leggat own the claim described, but he has agreed to cause good and sufficient title to be conveyed....."

We submit that higher proof of agency could not be produced.

TESTIMONY OF JAMES E. MURRAY.
64 R.

The testimony of Mr. James E. Murray, another disinterested witness, bears strong resemblance to the testimony given by the attorney for the creditors in the renowned case of Tisdale v. Tisdale, which we shall cite later on in the brief. Mr. Murray personally is entirely disinterested. He had two judgments against Mr. McLure. He had had three, but one was settled by a promissory note, and the promissory note was merged into the second. We abridge Mr. Murray's testimony.

> "Q. Did you have a conversation with Mr. McLure wherein Mr. Leggat was present shortly after the sale of this property on the Wight & Pew judgment?
>
> "A. Yes, in fact nearly every conversation I had with Mr. McLure was at times when Mr. Leggat would be present.....After securing judgment I told them that I wanted to know whether he would pay the amount, or whether I should proceed to enforce our claim by selling the property. It seems to me that during these negotiations I learned that the property had been sold under this Wight & Pew judgment, and that it had been bought in by Mr. Leggat; or Mr. McLure told me that they expected to sell the property, and that they did not want me to proceed in any matter so as to complicate the title any further, and that as soon as they sold it our judgment would be paid off, and requested me not to go ahead with it any further,—yes it was subsequent to the time that Mr. Leggat bought the

property in. In fact I was told first. I did not examine the record to see exactly what property was involved, but I was told at first that the Elvina was not included in it, but later on I learned that the whole four claims were included in that sale.

Q. As to this conversation which you say you had with Mr. McLure, do you remember whether Mr. Leggat was present?

A. My recollection is that Mr. Leggat was present.

Q. Did Mr. Leggat say anything at that time?

A. Well, he frequently, and in that conversation and in other conversations assured me that Mr. McLure would pay this judgment....."

"Q. And at any of these conversations that you had with Mr. McLure that you have spoken of, wherein Mr. Leggat was present, did Mr. Leggat say to you or tell you that he was simply holding the property for Mr. McLure?

A. Well, now, I would not say that Mr. Leggat told me that, but Mr. McLure did.

Q. Mr. McLure told you in Mr. Leggat's presence?

A. Yes, sir.

Q. And did Mr. Leggat ever deny it?

A. Never denied it at all at any time.....

A. .....The last conversation I think we had would be a month or two prior to the supplementary proceedings.....

A. There were two or three conversations in which the matter was discussed. Of course the representations made in the first conversation were that Mr. McLure owned the property, and that Mr. Leggat had bid it in and was going to

carry it for him until a sale was made, and in the subsequent conversation they might not have repeated that statement, but the matter was referred to in a way that I was made to understand that they were trying to sell the property and as soon as they would sell it that Mr. Murray would get his money. I was urging them to hurry up and pay the claim that I had against them, and I think Mr. Leggat looked me up once or twice himself and wanted to have me go down to the hotel and meet Mr. McLure, and as I stated, Mr. Leggat was present at nearly every conversation I had.

Q. When you would have these conversations with Mr. Leggat, did he ever at any time claim that he owned the property, or that he was holding it for himself?

A. Never at any of these conversations.

Q. Did he state in any of them that he was holding them for the purpose of a sale, to make a sale?

A. Yes, he did not say he was holding. them for the purpose of making a sale, but he told me that they had endeavored to make the sale, and notwithstanding the fact that the companies were holding these options (had) let them lapse, they expected to be able to make a deal with them yet."

Of course Mr. Murray has a remote indirect interest as an attorney in the success of his work against Mr. McLure, but no one can imagine that such an indirect interest would influence a man of Mr. Murray's standing in the community and among his fellows at the bar to bias his testimony. His testimony

is entitled to the same faith that was accorded the attorney for the creditors in the Tisdale case.

WILLIAM McLURE
70 R.

is the son of Charles McLure. After the period of redemption had expired he meets Mr. Leggat in St. Louis about the first of March of 1915. He told Mr. Leggat that he was coming to Butte to try to make a sale of the Butte property.

"Q. What properties did he know you were speaking of, and what properties were you speaking of?

A. The Eastern, the Bland and the Ouichita. Those were what I had always spoken of as the Butte properties, and he made no answer in regard to that.

Q. Did he know you were coming to Butte, Montana, to sell this property, or to negotiate for the sale of it last March?

A. He did because I told him so.

Q. Did he make any objections—what, if any, claim of ownership did he make to the property?

A. He did not make any claim of ownership.

Q. Was there anything said about your coming here to represent him in any way?

A. No, sir.

Q. He knew whom you were coming here to represent?

A. Oh, yes.

Q. And who was that?

A. It was my father.

We claim that this testimony is peculiarly cogent in this. The young man in no wise tries to bias his testimony nor to overdo it.

THE TESTIMONY OF THE PLAINTIFF.

74 R. Et Seq.

Direct Examination by Judge Rasch:

Mr. McLure lives at St. Louis since about 1881, lived in Montana from 1864 to 1881; is now passed seventy-three years of age; came to Virginia City, Montana, about the 4th of July, 1864; engaged in the business of freighting, prospecting and mining. Met Mr. Leggat in 1867 or 1868 in the city of Helena; relations were very friendly. In the early days they had met merely as friends; would always get together, sometimes take dinner together, and sometimes he would go down to the mine above Helena in the Scratch Gravel District, in which Mr. McLure was interested. Social relations had been very intimate.

We shall quote frequently from the witness:

> "I knew him in Butte after he moved over there. We always met at the hotels and saloons, or wherever we were to come together. We were always friendly. He has lived in the same neighborhood and our friends were mutual. We were engaged in business together after Granite came up and I had some money. We went into several propositions together. The first business I had with him directly was over at Sand Creek or over at Sappington. Mr. Leggat had been holding the McVey and the Chile claims, two locations. I judge that was in the eighties, about eighty-one

or eighty-two, and I spent $40,000.00 there. Operations continued nine months or a year." 75 R.

"Q. How much of the forty thousand was contributed by Mr. Leggat?

A. None of it. Mr. Leggat was holding the bond and looking after the accounts. I think he paid them after the money was forwarded from St. Louis. Mr. Leggat always had the contract for the work and spending of the money. He supervised it and McLure furnished the money."

The next business venture was in the Cardwell district in Jefferson County. It cost McLure something between seven and nine thousand dollars. McLure contributed only to the funds, Leggat looked after the property, attended to the representation, the discoveries and stakes, handled the money. 78 R.

These two ventures being unprofitable Leggat suggests working the Elvina. They bought up the outstanding interests in the property for $12,500 every quarter. McLure bought it up and paid the money to Mr. Leggat, and Mr. Leggat carried on the negotiations for them and paid out the money. Even in the early eighties Mr. Leggat was entrusted with the payment of at least twice $12,500 of McLure's money for the purchase of property. McLure then spent $90,000.00 in development under the immediate superintendence of Mr. Leggat. 79 R.

When this venture proved a failure we find a settlement of the partnership affairs as grotesque as any that probably ever took place. We quote the words of the plaintiff:

> "When we had to shut down on account of the fall in the price of silver, discontinue, one day I says to Rod, 'There is not much chance for any payment back, let's cut the whole thing off and we will divide the property, and we cleared that up entirely."

All the money was advanced by McLure. Mr. Leggat had charge of it. He paid the bills.

This brings us down to the dealings with the Eastern. Speaking of the Eastern, Mr. McLure says:

> "Why we leased it several times and Mr. Leggat attended to the collection of the royalty. He paid the taxes and such expenses as came along. I always let him do the negotiating. Quite a number of them came to me at different times and asked me to sell it, and I told them to go to Mr. Leggat; he has charge of it."

When Mr. Leggat had concluded the deal on the Eastern in examining the title it was found that the legal title to a portion of the ground stood in the name of Mr. McLure's deceased mother. Mr. Leggat was appointed administrator of the estate of Mr. McLure's deceased mother at the request of Mr. McLure. McLure says that he got thirty per cent. of the payments on the Eastern: One of ten per cent. and one of twenty per cent. Incidentally this would leave the option still in force on the date of the sheriff's sale. They were all patented claims. Mrs. McLure, the wife of the defendant, was at times insane. It was necessary to have a guardian appointed for her and ad-

measure her dower interest in the lands. Three appraisers were appointed, one of whom was the defendant, R. D. Leggat. The original appraisement is introduced in evidence under the testimony of Mr. McLure. The figures of the appraisement have been given. Mr. McLure testified that his wife had no other interest in the property save her inchoate right of dower.

Mr. McLure identifies a vast number of letters from Mr. Leggat about the properties involved in the suit, other business matters, New Year's greetings and other social amenities.

The letters which were introduced were only a small portion of letters received from Mr. Leggat. The balance were offered to counsel for inspection.

Mr. McLure continues his testimony. He is asked what has been the value of these properties involved in this suit since June 1st, 1913, or the first of January, 1913.

> "A.....Mr. Channing came after me to get me to set a price on the Eastern....., and he offered me $100,000.00 and I declined it and said he would have to see Mr. Leggat; that I would not make the price on the property; that Mr. Leggat had charge of it; that the property was held at $200,000.00. And on the Bland there was one time Mr. Charles S. Warren took the proposition and offered $80,000.00 cash."

Mr. McLure had bought and sold a great many mining properties, both quartz and placer, for the last

thirty years and had familiarized himself with the values of mining properties—what they were bought and sold for. He qualified himself as well to speak of value as to such properties as anyone possibly could. Coming down to the morning of the sale, Mr. McLure says:

> "I got up early in the morning, got my breakfast, went up to the sheriff's office. I got there about eight o'clock, or I believe a half hour or a quarter of an hour before eight o'clock, and the deputy or clerk was there and I asked them if I could come up and pay off the judgment, stop the sale. In other words, I wanted to save any expense of a sheriff's sale and he replied to me that the property had been advertised for sale and would have to be sold, and I asked him then what time it would be sold and he said at ten o'clock. I then asked him if he would take my check if I would bid on the property and he said it would have to be a certified check. 'Well,' says I, 'you can telephone to the bank to see whether the check is good,' and he replied then, he says, 'Mr. Wight will be here at the sale and if he will take your check it will be all right," and my reply was that Mr. Wight had sued me and I would not ask him to take my check; so I came up and went to the hotel, which was at least a few minutes before nine o'clock, and I telephoned to Mr. Leggat and told him what had past, and as Mr. Leggat was an owner in the Elvina claim, (which was in my name, or rather I held it), and I told him they had refused my check, and I says 'come over,' and he says 'all right, I will be right over,' and he came over and I was sitting in the hotel waiting

for him to come and I saw him coming across the street, and before he had crossed the street I went over and stopped him and I says 'Mr. Leggat, the sale is to be at ten o'clock,' and I says 'they refused my check,' and he says 'they will take my check,' and I says 'will you come up and bid it in,' and he says 'yes,' and I says 'I will give you a check when you come down,' and he says, "all right, I will go up and attend to it'. . . . . ; and he said that there had been other bidders and that he had told them it was our joint property, and he said that by his own influence he had persuaded them not to bid against him, so he told them their account would be all right and that he would bid it in and he did bid it in, and I says, 'Rod, if you want a check for this I will give you my check for it,' and he says 'never mind that.' "

There is further testimony that he procured others not to bid; that he would see that their debts were paid and that they would be perfectly secured as the matter was in his hands. The plaintiff testified that in the August before he had loaned Mr. Leggat $500.00 for a trip to St. Louis; that it had never been repaid. The plaintiff never thought of it until he got to thinking about matters connected with the case, and after the present suit was brought he found the check. The loan was not to bear interest. Mr. Leggat agreed that he would deed the property back to him if it became necessary. Witness proceeds:

"Q. What did you say and what did he say,

if you recall, at that time immediately after the sale?

A. I think I asked him. I says, 'Rod, if the sale goes through, will you make me a deed,' and he said 'yes,' and then I asked him 'In case the sale does not go through will you make a deed back to me, keeping your half interest in the Elvina,' and he says 'Certainly I will.'"

Witness proceeds:

"The Elvina interest stood in McLure's name in July, 1912."

Mr. McLure says, however, he, (meaning Mr. Leggat) was the real owner of one-half and I the other half.

On July 17, 1912, Mr. McLure, though holding the half interest of the Elvina of Mr. Leggat, had joined with Mr. Leggat in a lease and option on the ground to Anderson and Slattendale. The lease was offered in evidence. The witness proceeds: That he saw Mr. Leggat very frequently after that. Mr. Leggat would call on him at the hotel and they were pretty good comrades. Witness, in describing it, answers "Well, you might say friendly more than socially. I don't think there was much socialibility connected with it, but was friendly. Sometimes we would go to (theaters); sometimes we would take the car and ride out to the Lake; sometimes we would ride out to the Gardens."

"Q. Now during the year before the expiration of the time for redemption, did you and him speak about this property?

A. Almost every time we would meet we would be sure to speak about it. I knew it was on his mind and it was in my mind, but I think both needed the money, and both anxious to have the sale consummated and get the money."

The witness explains by sale he meant the transaction with Wolvin and Hayes.

Witness goes on:

"Q. Were you in Butte between the 26th day of May and the first day of June of last year?

A. Yes, sir.

Q. Did you have any conversation with Mr. Leggat about this proposition then?"

A. Yes.

Q. Will you state to the court what that conversation was in substance?

"A.....And I said to Rod then, 'within a day or so you will get a deed. I want an understanding about it. If the sale is made will you make a deed over from Wolvin and Hayes to me,' and he said 'yes,' and I said 'In case it does not go through will you make it to me,' and he said 'Certainly.' That was a short time before the limitation ran out.

Q. What do you mean by limitation?

A. I mean what you call the redemption.

Q. Now, Mr. McLure, was anything further said?

A. I told him that 'If you want a check for that I have got one for you,' but I had forgotten about the $500.00 until I was looking through my papers; but of course he would have gotten my check for whatever he had paid out and I would consider that now as far as that is concerned.

Q. Did you have enough money on hand at that time to have paid $1,004.00 and interest at the rate of 8% from June 1st, 1914?

A. Yes, sir.

Q. And your check would have been good for that amount?

A. I know it was; yes, sir.

Further the witness proceeds:

When in St. Louis Mr. Leggat always got his mail at the witness' office, though Mr. Leggat had relatives there. Witness proceeds: That in November of last year he commenced negotiations to sell the Butte property. He was going to try to raise some money. He told Mr. Leggat that he was going to do so, and that he needed it. Witness writes to his attorney in Butte to negotiate. Witness said that he would take $40,000.00 and discussed with Mr. Leggat before that an offer to sell the property for $100,000.00. Mr. Leggat did not claim to own the property; simply said "Charlie, you are getting pretty low on it. You have come down a good deal." Witness told Mr. Leggat that if he got $40,000.00 he would expect him to make a deed. Mr. Leggat answers "Certainly I will make a deed."

Witness says that he has been a citizen of Missouri since 1881, and was residing there when this suit was commenced. Witness knows the signature of Mr. Leggat on the back of the check for $500.00. Witness makes proffer of others letters from Mr. Leggat. Witness explains certain errors in the bill of com-

plaint. In the bill it is alleged that he was present at the sale. Witness says he was not present; that he had entrusted it to Mr. Leggat. Witness says that Mr. Leggat first refused to recognize his ownership after the witness' son had practically sold the property, and had a cash offer of $40,000.00 for two claims,—the Eastern and the Ouichita, just the interest in the same owned by the witness.

Witness explains the altercation which arose when he accused Mr. Leggat of breach of faith and when the latter made his first claim that it was his own property. Witness explains that Mr. Leggat told him he had sold the property; refused to say what he got for it. Witness explains his ability to pay $1,004.15 and interest from the date of the sale until the 7th day of April, 1915. Witness announces that he could get that much cash on the day of the hearing. He cannot say that he made an offer to pay it after Mr. Leggat told him that he had sold the property.

Witness instituted suit for an accounting in St. Louis. Mr. Leggat's deposition was taken. Mr. Leggat testified that he had the interest he had bought under the judgment and still had it, and when that fact was found out that suit was dismissed.

Witness immediately wired Mr. Templeman's office and advised to institute proceedings to protect himself against an innocent purchaser, and this suit is on trial. When the suit was brought the witness was in St. Louis and his attorneys were in Butte. Witness recites that in the latter part of January defendant was

perfectly willing to make a deed. Witness recites why he offered a portion of the ground at $40,000.00. His answer is that he was in considerable need and considered it a sacrifice. The witness recites that Mr. Leggat is at present in Helena at the Placer Hotel, and that he is ready and able and willing to pay either the sum of $1,004.15 or the sum of $504.15, whichever may be adjudged, and interest at the rate of eight per cent. per annum from Just 1st, 1913.

Witness offers the monthly accounts rendered by Mr. Leggat with reference to the Elvina Mining company and the Chile company, showing his expenditures, for inspection of counsel.

The cross examination of Mr. McLure developed no inconsistencies in his testimony and brought out no new facts. It is somewhat interesting. The witness' direct testimony embraces 114 pages; his cross less than 21 pages. The sheriff's deed and certificate are in the record.

AS TO THE LAW IN MORE DETAIL.

An examination of a quite accurate work, and an article written by Oliver A. Harker, Dean of the College of Law, University of Illinois, and one time Justice of the Appellate Court of the State of Ill., 24 Cyc. 39, Subject "Judicial Sale" has the following to say:

> "Inadequacy of the price obtained on the sale, standing alone, is not sufficient ground for setting aside a sale, unless the inadequacy is so great as in itself to raise a presumption of fraud, or to

> shock the conscience of the court; but when in connection with the inadequacy of price there are other circumstances having a tendency to cause such inadequacy, apparent unfairness or impropriety, the sale may be set aside, although such additional circumstances are slight and, if unaccompanied by inadequacy of price, would not furnish sufficient ground for vacating the sale."

The text is strongly supported by citation to authorities. In a foot-note the author gives instances of gross inadequacy warranting setting aside (evidently without any further circumstances). We quote:

> "Property worth one thousand dollars sold for six dollars. Lankford v. Jackson, 21 Ala. 650. Property worth two thousand five hundred dollars sold for five dollars. Daly v. Ely, (N. Jer. Eq.) 26 Atl. 263. Property worth sixteen thousand dollars sold for seven thousand dollars. Banning v. Pendery, 7 Ohio. Dec. 677. Land worth from two to five dollars per acre sold for twenty-eight cents per acre. Hardin v. Smith, 49 Tex. 420. Sale for a half or a third of actual value. Sinnett v. Cralle, 4 West Va. 600.

The Supreme Court of the United States cites with approval the following language from Mr. Kerr, in his Treatise on Fraud and Mistake:

> "Inadequacy of consideration, if it be of so gross a nature as to amount in itself to conclusive and decisive evidence of fraud, is a ground for cancelling the transaction."

The court further cites Chancellor De Saussure, quoting with approval:

> "I consider the result of the great body of cases to be, that wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong, and in general, a conclusive, presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness or the distress and necessity of the vendor, and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of the fairness of his conduct. It is true these observations, both of Mr. Kerr and Chancellor De Saussure were made in reference to private sales between parties, and do not strictly apply to judicial sales, but they show that great inadequacy of price is a circumstance which a court of equity will always regard with suspicion unless it appears by the circumstances of the case, or by evidence, that it is no fault of the buyer."
>
> Graffam v. Burgess, 117 U. S. 195.

In the same case the court uses this language:

> "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law."

There is in this opinion other language. It is claimed that Mr. McLure was negligent. For the pur-

pose of the argument we might admit it. What man, after the protestations of thirty years of loyalty and friendship would not be negligent; but the Supreme Court of the United States quotes this language with approval:

> "The sale in this case is a great oppression on the complainants. They are ignorant, stupid, *perverse* and poor. They lose by it all their property, and are ill-fitted to acquire more. They are such as this court should incline to protect, notwithstanding perverseness. The Chancellor allowed the complainant to redeem the property by paying the purchase price and costs."

Surely if the Chancellor extends the right to redeem to the *perverse,* his correcting hand will reach forth more willingly in aid of such as are only negligent because confiding. A true man is by virtue of being so himself most confident of the integrity of others.

In much the various Circuit Courts of Appeals are courts of final resort. They are of almost equal dignity with the Supreme Court in point of authority. The Circuit Court of Appeals of the Sixth Circuit, presided over by Taft and Lurton, J. J., in Magann v. Segal, 92 Fed., 252, uses the following language:

> "Upon the weight of American authority, we conclude that a price so inadequate as to shock the conscience, or mere inadequacy, coupled with misconduct upon the part of those conducting the sale, or fraud, or conduct bordering upon fraud, upon

> the part of the purchaser, under the practice of both English and American Courts, has always been regarded as furnishing good cause for re-opening the biddings." Page 259.

And in the decision is tabulated a list of instances and circumstances where mere inadequacy, coupled with any other circumstances, has resulted in setting aside the sale. Pages 262, 263.

The Supreme Court has spoken at great length on a similar case, Shroeder v. Young, 161 U. S. 334. We will not quote from the case. We ask full reading, for it sustains our position as to inadequacy of price, if "so gross as to shock the conscience" being sufficient ground in itself. If it is attended with any irregularity such as a sale *enmasse,* or if bidders were kept away, or any undue advantage taken, or a lulling into false security, the sale may be set aside. It disposes of the question raised by objection frequently made in behalf of the defendant that assurances made before the statutory period, and relied on, have to be in writing. The court holds that they do not.

It might be said that there are many leading cases on this general proposition of setting aside judicial sales for inadequacy of price, coupled with irregularities. We commend to the court the case of Groff v. Jones (N. Y.), 22 Am. Dec. 545. The history of this case is treated in 22 Am. Dec. 545, Extra Anno. Ed., and it is brought down to a recent date strongly sustained, and often cited. We would say from a glance it had been cited with approval fifty times.

THE BURDEN OF PROOF.

Mr. McLure had the burden of proof at the opening of the case. In the progress of a trial it frequently happens that if certain facts are established conclusively, or merely by a preponderance of the evidence, then the burden as to other facts in the case is shifted to the defendant. For instance, in setting aside a sale from a ward to a guardian, soon after the majority of the ward, the burden of proof would be on the ward in the first instance to establish the relationship, and perhaps that the transaction was very close after the relationship ended. After such facts were established, as they usually are by conclusive proof or very strong preponderance, the burden would immediately shift upon the guardian to show that the transaction was in all respects fair and regular for an adequate, full, complete consideration. This proposition of law is elementary. We cite it only as illustrative of the point we make.

In the first instance it was on Mr. McLure to establish the fact that a relation of great trust and confidence and agency, stewardship, intimate business relations; intimate social relations had existed between him and Mr. Leggat. This burden has been sustained and overcome as conclusively as any initial burden in a lawsuit ever was or ever will be, and by unimpeachable documents over Mr. Leggat's signature, going through a period of more than a score of years, and in the most intimate relations known to have existed between the two men:

The entrusting by McLure of the expenditure of $90,000.00 by Leggat in one transaction, $40,000.00 in another, $8,000.00 in another, when McLure was in St. Louis and Leggat on the ground; the permitting of Leggat to give leases on the mining ground; the permitting of Leggat to conduct the sales and fix the price of mining ground; Leggat's permission of his half interest in the Elvina to stand in McLure's name for many years; the request of McLure to the courts of Montana that Leggat be appointed administrator of McLure's mother's estate; the assertion in writing that McLure could put any property in Leggat's name and it would be transferred on request.

No attorney could ever gain a more complete confidence of his client than Leggat gained over McLure; no factor a more complete confidence over his principal. This relation is as conclusively established as if it were an admitted fact in the answer of the defendant, and when such relation existed, disregarding for the time being the question of the inadequacy of price, the burden would be upon Mr. Leggat to show the transaction fair and regular in all respects.

Mr. Devlin, in his monumental work on Deeds, 3d Ed., Vol. 2, page 2106, Par. 1108, uses this language:

> "A court of equity will closely watch transactions between persons occupying confidential relations toward each other. Where a deed has been made by a person to his confidential agent and adviser, and the grantor claims that it was given and received as security for a loan, the whole

burden of sustaining the validity and good faith of the dealings between the parties is imposed upon the agent and adviser. 'Now it is a well-settled principle of equity jurisprudence,' said Mr. Justice Potter, 'that the court will always look with jealousy upon all transactions between parties so situated; and the burden of proof is entirely upon the guardian, trustee, agent, or other person sustaining this confidential relation, to show that he has taken no advantage of his situation. It is not necessary that there should be fraud to justify the court's interference. In the present case, there were all the elements usually found in cases where the courts have granted relief. There was complete ignorance of business affairs, complete confidence, and the dependence resulting from that confidence on one side, and on the other side, superior business knowledge, and the influence of his position as administrator of her father's estate.' "

The text is well supported by citations. This applies to deeds at judicial sale, as well as to deeds between private parties.

We quote again from Mr. Devlin's monumental work, Par. 1113, page 2116, 3rd Ed.:

"Two persons occupied the position of co-administrators of an estate. One of them made a deed of land to the other, describing him as the administrator of the estate. The grantor having died, a suit was brought by his heirs and representatives to have the deed declared to be a mortgage. The facts were, that the deed was intended only as security for the repayment of funds

of the estate used in paying the purchase money; the grantor continued to reside on the land; he paid taxes on the property, and erected permanent improvements. After the death of the grantor, the grantee stated to a person who desired to buy the property, that he thought he had a mortgage on the property, but, after examining his papers, he ascertained that he had a deed. This statement was not denied or explained by the grantee. The court held that while the evidence must be clear and convincing, yet, that under the circumstances, the deed should be considered to be a mortgage. If an assignment of a certificate of redemption to secure a loan of money which the assignee has made to the redemptioner, with which to make a redemption by means of a second mortgage from a sale made under the foreclosure of a prior mortgage, is, in reality, a hypothecation of the redemptioner's interest in the land, to the lender, the latter, if he obtains the sheriff deed under the certificate assigned to him, will hold as mortgagee and not as absolute owner. If the title is obtained by a person at a judgment sale under an agreement that it is to be security for a debt or for money loaned, the transaction is a mortgage."

And further Mr. Devlin says, Par. 1124:

"If a third person is induced to become a purchaser, and he agrees to convey the premises to the person inducing him to purchase on the payment of a certain sum to him within a certain time, the agreement must be complied with, or all rights to purchase under it are forfeited. A conditional sale and not a mortgage must be the re-

sult where the relation of debtor and creditor is not created. But in equity, if the debtor has any interest in the property, legal or equitable, and obtains a conveyance for a person who advances money therefor, upon an understanding that the title shall be transferred to him upon paying the money advanced, he has the right to redeem from the grantee, who, having secured the title by his act, holds it as his mortgage. Where a person has a contract for the purchase of land, and procures another who takes the deed in his own name to advance the money, the latter is a mortgagee, and his rights and obligations are the same as they would be if the land had been transferred to him by the debtor. But then the person procuring another to purchase land must have either an equitable or legal interest in it, to cause an agreement by the purchaser to convey upon being reimbursed, to constitute the transaction a mortgage. When there is no such interest, the transaction will be regarded as a mere contract of sale. Where a mortgagor after the expiration of the statutory time was allowed to redeem, another person advancing the money, and the mortgagee executed a quitclaim conveyance to the mortgagor, and the latter executed an absolute deed to the person advancing the money, and received back a written agreement giving a certain time to redeem on payment of the money advanced, the conveyance in equity was deemed a mortgage."

And on the subject of parol evidence to declare an absolute deed, whether that of a sheriff or a private party, or anyone else, a mortgage. It is interesting to read Section 1100 of Mr. Devlin.

THE EFFECT OF MR. LEGGAT'S CO-OWNERSHIP IN THE ELVINA.

On the morning of the sale, if we disregard the lien of judgment against McLure, the equitable title of the Elvina, a claim which had cost McLure $12,500.00 per quarter, was one-half Leggat's and one-half McLure's, as per the old agreement to declare the $45,000.00 off which Leggat owed McLure, *and which was without any consideration.* This transaction was, of course, eighteen or nineteen years old, but the statute of limitations on it had not run, and the original calling off was without any consideration. In the initiation of this legal title in McLure there was a debt of $90,000.00 if it be viewed as the partnership of Leggat and McLure from the firm to McLure; of $45,000.00 if they be viewed as joint adventurers. Leggat had the right to redeem. McLure had an opposing right to foreclose had he chose to claim the want of all consideration for the release. At this sale, which was coming up, all of McLure's interest was advertised for sale, and that included as well and as truly, the interest of McLure as a lienee on Leggat's half interest as it did his right and title in his own half interest.

This question of the statute of limitations not having run is fixed by statute in Montana, Section 3780 Civil Code of 1895, re-enacted into Section 5723 Revised Codes of 1907, and fortified by judicial decisions of the Supreme Court of the State.

Grogan v. Valley Trading Co., 30 Mont. 231.

These facts beautifully illustrate the wisdom of the courts in announcing the proposition that where one tenant in common buys the common property at a sale under an incumbrance on the joint property, he is deemed to hold the title subject to, and for the benefit of all of his tenants in common. It is presumed that he is acting for himself as well as being a purchaser.

The discussion leads us to the noted case of Tisdale v. Tisdale, 2 Snead, 596 (Tenn.) 64 Am. Dec. 775. A long history of the case on the last two pages of the volume as it appears in the extra annotated edition. Quoting from the head lines :

> "Tenants in common by descent are by operation of law placed in confidential relation to each other as to joint property; each is prohibited from acquiring rights in it antagonistic to the others, and the same duties are imposed as if a joint trust were created between them, or by the act of a third party.
>
> Implied obligation exists between tenants in common to sustain common interest, which will be enforced in court of equity as trust, and the purchase of an incumbrance or outstanding title upon the joint estate by one in his own name will inure to the benefit of all, but they will be compelled to contribute their respective ratios of the consideration paid."

It is interesting to note that more than twenty years had elapsed in the Tisdale case—"It was more than twenty years from the defendant's last purchase and

the vestiture of title before the bill was filed." We abridge the facts as stated in the opinion:

Complainants and defendants were the heirs of John Tisdale. Lands were incumbered at the time of his death with a mortgage. The estate was insolvent except for the mortgaged property, and most of the heirs otherwise poor, and unable or unwilling to discharge the mortgage, a decree passed for the sale of the land in foreclosure. To meet this emergency, the defendant Daniel Tisdale and his brother-in-law borrowed $6,000.00. With this money Daniel attended the sale, and in November, 1830, bought 5,000 acres at 70 cents per acre, and at a sale of the balance in May, 1831, bought 28,580 acres at nine cents per acre. These sales were confirmed and the title vested in the said Daniel individually, who got an agent, Loving, to sell the land. The object of the bill was to make Daniel account for $47,000 profits from the land. The defense was

(1) That Daniel purchased the land at judicial sale for himself with funds of his own, for which the complainants were in no way liable after they had all failed, and some of them refused to become bound, and consequently he is entitled individually to the benefits of his purchase, as the risk, hazard and trouble were all incurred by him.

(2) That he is protected by the statute of limitations.

We make the following extracts from the opinion:

"Can the ground of defense first stated avail him? We think not, for several reasons."

"Thus circumstanced, then, could he take to himself, individually, the benefits of his purchase, to the exclusion of his co-tenants? Surely not. Nothing is better settled in equity jurisprudence. It is one of the canons of a court of equity that one who undertakes to act for others cannot in the same matter act for himself. Where confidence is reposed, duties and obligations arise which equity will enforce. A trustee cannot throw off the trust at pleasure, to the injury of the *cestui que trust*. He will not be allowed to mix up his own interests and affairs with those of the beneficiary. This doctrine has its foundation, not so much in the commission of actual fraud, but in that profound knowledge of the human heart which dictated that hallowed petition, 'Lead us not into temptation, but deliver us from evil,' and that caused the announcement of the infallible truth, that 'a man cannot serve two masters.' The right to sell and to buy cannot exist in the same person, because of the antagonistic interest in the two positions. Hence, the fairness or unfairness of the transaction, and the comparison of price and value, or the existence or absence of actual fraud, are not permitted to enter into the consideration of the court. It is enough that the relation of trustee and *cestui que trust* existed. This appearing, the investigation is at an end, and the doctrine applies with all its force. It is certainly too late in the day to require the citation of authorities to establish this doctrine. But they may be found collected in the cases of Keech v. Sandford, 1 White & Tudor's Lead. Cas. 47-58,

and Fox v. Mackreth, Id. 105-146, as to the two aspects in which we have discussed this case."

Leaving out all questions except the naked one that Leggat was a co-owner in the Elvina, the law would presume that he was protecting his own property by the purchase at the sale, and held him as a trustee, but the Circuit Court of Appeals of the Eighth Circuit has announced a broader rule. In Trice v. Comstock, 121 Fed. 620, in an opinion written by Mr. Justice Sanborn, the following words appear:

"Nor is it any defense to the suit to enforce this trust that the agency had terminated before the confidence was violated. The duty of an attorney to be true to his client, or of an agent to be faithful to his principal, does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation. It is as sacred and inviolable after as before the expiration of its term." Eoff v. Irvine, 108 Mo. 378, 383, 18 S. W. 907; Robb v. Green (1895) 2 Q. B. 315, 317-320; Louis v. Smellie, 73 L. T. N. S. 226, 228. In Eoff v. Irvine, after an attorney had examined an abstract of title for a client, and after the relation had ceased, he, by the use of the knowledge he had acquired in the examination, secured the title to the property for himself and his friends, but the court decreed that they held it in trust for his former client. In Robb v. Green a manager of a business copied the names of the customers from the order book of his master, the proprietor. After the manager's term of service had ended, he established a business

in competition with that of his master, and proceeded to use the names of customers he had copied to divert business to himself, but the court decided that he held this information in trust for his former master, and enjoined him from using it against him.

Another objection earnestly urged against the equity of the complainants is that Comstock had no discretionary power, no authority to sell the land; that his only agency was to solicit and conduct probable customers to his principals; and that, if he was disabled from purchasing this Buckwater tract, he was disabled from buying any land in Barton county. It does not follow that Comstock was forbidden to purchase any land in Barton county because he was disabled from buying the Buckwater tract. He was prohibited from using the information and advantages he had secured by means of his agency to prevent or hinder his principals from accomplishing the purpose of the agency. His disability extended to all land by the purchase of which through the information and benefits he had derived from the agency he would hinder or obstruct his principal's business of buying and selling lands in Missouri. But it extended no farther. He was at liberty to deal in any lands in Barton county concerning which he had learned nothing by the means of his agency. But he could not lawfully use any information or interest acquired thereby to destroy or to injure the business of his principals.

Nor was discretion or authority to sell these 1,925 acres of land requisite to disable this agent from buying and holding them adversely to his

principals. Every agency creates a fiduciary relation, and every agent, however limited his authority, is disabled from using any information or advantage he acquires through his agency, either to acquire property or to do any other act which defeats or hinders the efforts of his principals to accomplish the purpose for which the agency was established. In Gardner v. Ogden, 22 N. Y. 327, 343, 350, 78 Am. Dec. 192, the clerk of the brokers of the plaintiffs was held to be disabled from buying the plaintiffs' property, although he never had any discretion or authority relative to the sale of it. In Winn v. Dillon, 27 Miss. 494, 497, Dillon was declared to be disabled from purchasing the lands he acquired, although the only authority he ever had was to search out and report their descriptions. In Davis v. Hamlin, 108 Ill. 39, 49, 48 Am. Rep. 541, an agent of a lessee to procure amusements for his theater, who never had any authority to deal with the leasehold estate, was held to be disabled from taking a renewal of the lease himself, and was adjudged to hold the leasehold interest which he had secured for the exclusive use and benefit of his principal.

The truth is that the principle of law which controls the determination of this case is not limited or conditioned by the interests, powers, or injuries of the parties to the fiduciary relations. It is as broad, general, and universal as the relations themselves, and it charges everything acquired by the use of knowledge secured by virtue of these trust relations and in violation of the duty of fidelity imposed thereby with a constructive trust for the benefit of the party

whose confidence is betrayed. It dominates and controls the relation of attorney and client, principal and agent, employer and trusted employee, as completely as the relation of trustee and *cestui que trust*. In Greenlaw v. King, 5 Jur. 19, Lord Chancellor Cottenham, speaking of this doctrine, says: 'This rule was one of universal application, affecting all persons who came within its principle, which was that no party could be permitted to purchase an interest where he had a duty to perform which was inconsistent with the character of purchaser.' In Hamilton v. Wright, 9 Clark & F. 111, 122, Lord Brougham declared that it is the duty of a trustee 'to do nothing for the impairing or destruction of the trust, nor to place himself in a position inconsistent with the interests of the trust.' And on page 124 he said: 'Nor is it only on account of the conflict between his interest and his duty to the trust that such transactions are forbidden. The knowledge which he acquires as trustee is of itself sufficient ground of disqualification, and of requiring that such knowledge shall not be capable of being used for his own benefit to injure the trust.' The rule upon this subject was clearly and not too broadly stated in the American note to Keech v. Sandford, 1 White & T. Lead. Cas. in Eq. 4th Am. Ed. p. 62, 58, in these words: 'Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become as-

> sociated.' The facts of the case in hand brought it squarely within this rule, charged the title which the agent Comstock acquired with a constructive trust for the benefit of his principals, and furnished substantial ground for their application to a court of equity for appropriate relief."

While the noted Montana case of Harris v. Lloyd, 11 Mont. 391, has been called an expose of how much fraud one co-tenant can perpetrate on another in Montana, yet the decision does not go far enough to shield the defendant in this case. We quote the following language from this opinion:

> "It is true that one or two or more tenants in common, holding by a common title, cannot purchase an outstanding title or icnumbrance upon the joint estate for his own benefit. Such a purchase inures to the benefit of all because there is an obligation between them resulting from their joint claim and community of interest, that one of them shall not affect the claim to the prejudice of the others." Citing cases.

Mr. Meecham, in the second edition of his work on Agency, published in 1914, Par. 1198:

> "For the same reasons, an agent authorized to sell, exchange or lease his principal's property, may not without the latter's consent, become the purchaser or lessee.....
>
> Said a learned Judge: 'If such contracts were to be held valid, until shown to be fraudulent or corrupt, the result, as a general rule, would be that they must be enforced *in spite of fraud or*

corruption. Hence the only safe rule in such cases is to treat the contract as void without reference to the question of fraud in fact, unless affirmed by the opposite party. This rule appears to me so manifestly in accordance with sound public policy as to require no authority for its support.'

The prohibition applies, of course, as much to indirect violations as to direct ones."

Continuing Par. 1199:

"It is immaterial here that the principal has not been injured, or that the agent gave him as good terms as anybody would give. Neither is the situation altered, ordinarily, by the fact that the principal had fixed a price at which he was willing to sell, and that the agent buys at that price."

In Sec. 1200 the author maintains that the purchase of an agent at public sale is equally voidable. Nor does it matter that there had been a termination of the agency. We quote Sec. 1210:

"Even though the relation has terminated, the disability in this respect may still continue. Thus in one case it is said: 'The duty of an attorney to be true to his client, or of an agent to be faithful to his principal, does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation. It is as sacred and inviolate after as before the expiration of the term.' In this case it was held that an agent who, by reason of his employment to assist his principals in selling lands in a tract on which they had an option and which they were

> exploiting, had learned of the location, value and possibilities of the tract and who were its owners, would not be allowed, by resigning his agency to purchase the land in his own account and thus defeat his principal's purposes. He was charged as a *trustee.*"

As to the sale *en masse* or *in solido,* although the deed does not follow the certificate of sale, which recites that the properties were offered separately, yet both the certificate and the deed are fatally defective to withstand this direct attack, where the price was shockingly inadequate.

We submit that it was the duty of the sheriff under Montana statute, after, if he ever did (which is most probably not the fact) offer the tracts separately, to have offered them two at a time, three at a time, and also have offered the Elvina with the Ouichita, the Ouichita with the Eastern, the Elvina with the Bland, the Eastern with the Bland, etc.

The Illinois statute is substantially the same as ours. We quote from Cohen v. Menard, 24 N. E. 605:

> "The statutory provisions respecting the sale of realty upon execution is that, if the same is susceptible of division, it shall be sold in separate tracts or lots, and *only so much shall be sold as is necessary to satisfy the execution and costs.*
> Revised Statutes C. 77, Par. 12.
>
> It is the established construction of this statute that, where several adjoining tracts of land are levied upon, it is the duty of the sheriff to

offer each subdivision of the lands separately; and if no bid be made upon the tracts when so offered, to add two of them together, and offer them, and so on, until all the tracts have been thus offered; and, if no bids be made, he may then offer and sell the tracts *en masse* for a reasonable price. Day v. Graham, 1 Gilman, 435; Ross v. Mead, 5 Gilman, 171; Stewart v. Croes, Id. 442; Cowen v. Underwood, 16 Ill. 24; Phelps v. Conover, 25 Ill. 309; Morris v. Rovey, 73 Ill. 462; Douthett v. Kettle, 104 Ill. 356. And the rule applies with even greater force where the tracts are separated, if, indeed, tracts having no necessary connection with each other may be properly thus sold. Cases may occur, as held in Cowen v. Underwood and Phelps v. Conover, supra, where it might be to the interest of the debtor, or at least work no injury or prejudice to him, to thus sell; but, as there said, ordinarily the proper course would be to adjourn the sale. Of the tracts here levied upon, two of them adjoined, while the third was separated by the river from the other two, and was distant a mile or more. The presumption of law is that the officer did his duty in respect of this sale, but this presumption is overcome by his return. It is the duty of the officer, as said in the case last cited, if he sells *en masse,* to make full return of all the facts. From the return thus made in this case it appears that the officer did not offer even the adjoining tracts together before offering the whole together. The return is unequivocal that he offered the tracts separately, and, receiving no bids, he then offered all together. The debtor had the right, under the statute, to have no more of his property

sold than was necessary to satisfy the debt and costs. The adjoining tracts were shown to have been worth substantially three times as much as could have been demanded upon the execution, and presumably would have sold, if offered for enough to have satisfied the same. This bill is filed by the executors, and by the sole legatee under the will, and by a creditor of the estate, each of whom has such an interest in the subject matter of the litigation as to enable him to maintain this bill. It is shown that the estate is probably insolvent, and the creditor complainant entitled to share in the proceeds of the sale of this property, if it shall be restored to the estate. See Merwin v. Smith, 2 N. J. Eq. 193; Miller v. Carnall, 22 Ark. 274. Without pursuing that question further, it is clear, we think, that while the certificate of purchase remained the property of Cohen, who was the purchaser at the sale upon the execution issued on the Brickey judgment, the sale was clearly voidable; and when it appears, as it does in this case, that the land was sold at a grossly inadequate price, a court of equity will not hesitate to set the sale aside. If the irregularity was insufficient, of itself, to set the sale aside, a court of chancery, seeing that thereby an unconscionable advantage had been obtained, through and by reason of the failure of the officer to perform his duty, would seize upon the gross inadequacy of price as a ground of equitable interposition. Davis v. Dock Co., 129 Ill. 180, 21 N. E. Rep. 830. By the decree the complainants are required, as a condition to the relief granted, to pay appellant the amount of his bid, with 8 per cent. interest from the day of the sale. This is all that

> in equity and in good conscience he has a right to demand, and he should be content to pro rate, in respect of his allowances in the county court, with the other creditors of the estate, in the funds derived from the sale of these lands. The judgment of the appellate court is affirmed."

The proposition here advanced is the only possible true construction of the words "and only so much shall be sold as is necessary to satisfy the execution and the costs."

Our Section 6830 is substantially the same as the Illinois statute. The provision as to "only so much being sold as is necessary" is in even stronger language. It is "after sufficient property has been sold to satisfy the execution, no more can be sold." We have been unable to find any opinions of courts contrary to this proposition which we advance. The Minerd-Cohen case is further instructive. The difference between the actual value, $5,000.00, and the amount of the bid, $742.67, is spoken of as grossly inadequate. The difference is less than $4,300. The difference in the instant case, according to Mr. Leggat's own oath, as to the value, is something more than $150,000.00.

THERE IS ANOTHER IRREGULARITY IN THE SALE.

It was the duty of the sheriff to take personal property first before making any sale at all of the realty. It is undisputed, and appears from the testimony

of the officer of the Miners Savings Bank & Trust Company that Mr. McLure had on deposit on the morning of the sale, $1035.00, $30.00 more than enough to satisfy the execution.

It is further told that he notified the sheriff that he had this amount in bank. It is further told that he notified Mr. Leggat that he had announced such fact to the sheriff by offering his check. This situation leaves Mr. Leggat on the horn of the dilemma, either one of which defeats his right to this property. If he was at the sale bidding as McLure's agent, he cannot hold the property by reason of the trust agreement. If he was there bidding for himself with knowledge of this fact, he was no innocent purchaser at an open sale, but a purchaser at a voidable sale with knowledge before bidding, of the facts, which must avoid the sale.

This proposition of law,—personal property must be sold first, is statutory in Montana, (we have quoted enough of it), and was set forth in this execution. We cite the court to

Freeman on Executions, Par. 279, to the effect that the sheriff must levy upon personal property first, and sell it first. The text is supported by Barthelomew v. Hook, 23 Cal. 279, and also by cases, from Rhode Island, Virginia, Indiana, Kansas, Minnesota and North Carolina.

There are several decisions from the Montana Supreme Court of interest in this case. The early case of Reece v. Roush, 2 Mont. 586, is exactly similar

as to a portion of the facts. Quoting from the opinion:

> "Respondents owned and had possession of the lot Nov. 10, 1871, when it was sold by the sheriff under a decree of the District Court; that before the said sale, the appellant and respondents entered into an oral agreement by which the appellant agreed to bid off said property for the respondents, and advance the money therefor, and hold the legal title for the respondents in consideration that the respondents secure payment of the same by rents of certain property. This agreement was executed and the respondents continued in the possession of the lot.....
>
> Do the findings establish an implied or resulting trust? Where the contract to hold land in trust is the means of obtaining the legal title, 'the trust is not created by the contract but results or is implied from the fraud.' Browne on Frauds, Sec. 84. 'If the circumstances are such as to raise a resulting or implied trust upon the conveyance, the person entitled to such beneficial interest has the right, at any time, to declare the trust.' Perry on Trusts, Sec. 77. The case of Ryan v. Dox, 34 N. Y. 307, is directly in point, and reviews carefully the authorities. The facts are substantially the same as those in the case at bar, and it is not necessary to state them. The court held that the purchaser under a foreclosure sale who undertakes to purchase for the benefit of the mortgagor, and thus acquires the title at a price below its value, will be deemed the trustee of the property for whom he has undertaken the purchase. It is no objection that the agreement by which this purchase was made was not in writ-

ing. The law makes him a trustee *ex maleficio*. The statutes of New York contain provisions similar to those of this Territory, which have been cited. The court says: 'When one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that if the latter should refuse it would be a fraud upon the former to suffer his refusal to work to his prejudice.' It is an established rule in equity that a parol agreement, in part performed, is not within the statute of frauds.

The sixth section of the statute of frauds of California is the same as that of this Territory, which has been cited. In the case of Sandfoss v. Jones, 35 Cal. 486, the court discusses the legal principles, which are applicable to the facts before us, and Mr. Justice Sanderson says: 'So far as the contract relates to the sale of real estate, it amounts to an agreement on the part of Jones and Blanchard to buy the property at sheriff's sale for the benefit of Bartram, who was the execution debtor, and to advance their own money, if necessary, for that purpose. Whether they paid for the real estate wholly or in part, with Bartram's money, or their own exclusively, is immaterial. In either event their agreement was not within the statute of frauds, and was not, therefore, void because it was not in writing,' .....'If, however, we consider the averments of the complaint in the light which is most favorable to the defendants, we have a verbal agreement on their part with an execution debtor whose land is about to be sold by the sheriff, to purchase it with their own funds and hold it for

his benefit. Such an agreement is equivalent to a loan of the money and a taking of the title as security for its re-payment; or an agreement by one person to purchase land for the benefit of another under circumstances which would amount to a fraud upon the latter, if the former was allowed to repudiate his promise, and, therefore, not within the statute of frauds.'

These doctrines are maintained in the following cases: Astor v. L'Amoreux, 4 Sandf. 524; Foote v. Foote, 58 Barb. 258; Booth's Appeal, 35 Conn. 1651; Peabody v. Tarbell, 2 Cush. 226; McDonough v. O'Neil, 113 Mass. 92; Soggins v. Heard, 31 Miss. 428; Price v. Reeves, 38 Cal. 457."

The practice in these cases in Montana is portrayed in Toole v. Weirick, 39 Mont. 359, tried without a jury by the instant presiding judge when occupying the district bench of the state, 39 Mont. 359:

"While there are some cases holding that in a bill to redeem it is necessary to allege a tender, this is not the general rule. It is generally held sufficient that the bill discloses a readiness and intention to pay the amount found due. This is the effect of the decision in Mack v. Hill, 28 Mont. 99, 72 Pac. 307, and is the rule announced in 17 Ency. of Pl. & Pr. 965, and 8 Current Law, 1042. The function of a suit to redeem is to adjust the equities of the parties (8 Current Law, 1041); and, where a deed absolute on its face is decreed to be a mortgage, some kind of an accounting is usually necessary, and, because of this fact, it is generally impossible for the party seeking to redeem to make a tender, since the

> amount due is unliquidated and uncertain. This is true of the suit before us. If Gilchrist had assumed to make a tender, he would have been altogether uncertain as to the amount to be tendered. The rule is well stated in 27 Cyc. 1855, as follows: 'Where the bill for redemption is framed on the theory that the mortgage debt or some portion of it is still due, it must contain a tender or offer to pay the sum so admitted. If the amount due is unliquidated or disputed, it is sufficient to offer to pay such sum as the court shall find or determine to be justly due, or whatever sum may be found to be due upon taking and stating the account between the parties; and no such offer is necessary where plaintiff alleges that defendant has been already overpaid out of the proceeds of the property.' "

We cite the foregoing as relevant to be considered on the proposition of McLure's offering to pay $1,004.50 and interest in his bill, and subsequently finding that Leggat owed him $500.00 which should be deducted; and further on the proposition that no actual tender outside of the offer to pay in the pleadings is necessary. Of course, as McLure testified in the instant case, a tender would have been futile because Leggat had denied the existence of the mortgage..

In the Toole-Weirick case the Supreme Court of Montana mentions the fact that courts should limit the time within which the respondent Gilchrist shall effect a redemption, and the time ought not to exceed ninety days from the time the decree is finally entered.

The complainant submits that the following propositions of law are so well established by authority of the courts, and particularly the courts of the United States, that debate further upon them is foreclosed.

1. That while mere inadequacy of price is not alone sufficient to set aside a judicial sale and permit a party to redeem after the statutory period has expired, yet if the inadequacy of price is so great as to shock the conscience, it is conclusive evidence of fraud (constructive). In such event the sale will be set aside on an offer to redeem, even if made after the period of redemption has expired, and the party offering to redeem has not been guilty of gross laches.

2. That if, in addition to gross inadequacy of price, there be the slightest irregularity, the chancellor will seize upon such irregularity as a badge of oppression and permit the party to redeem after the statutory period has expired.

3. That a sale *en masse* of widely separated pieces of property is such a circumstance as will procure the chancellor to permit the redemption if coupled with gross inadequacy of price.

4. That the sale of an excessive quantity of land is such a circumstance as will procure the chancellor to grant a redemption after the statutory time has expired if coupled with a sale for a grossly inadequate price.

5. That where the buyer has been co-owner with, and co-tenant of the seller in a part of the land sold for many years, and a portion of his own land, to-wit,

the buyer's own undivided interest, is offered for sale in the name of the execution debtor, and the price is grossly inadequate, the chancellor will consider the buyer as acting to protect himself and a trustee for the debtor, such trust growing out of the intimate relations of co-tenants of land.

6. That where there is a relation of great trust and confidence, no matter how it arises, whether from the relation of guardian and ward, attorney and client, priest and parishioner, parent and child, physician and patient, (or "the friend that sticketh closer than a brother"), and there be gross inadequacy of price, the buyer will be held as trustee in an action to redeem after the time has expired.

7. That where there has been an agency about the ground, and one has for a long period of time been in position to learn by reason of such agency A PECULIAR OR LATENT value of the ground, then he cannot, even though the agency be terminated, (to use the language of Judge Sanborn, speaking for the Eighth Circuit Court of Appeals), avoid being prohibited from acquiring rights in that subject matter antagonistic to the person with whose interest he has become associated.

Trice v. Comstock, 121 Fed. 620; 61 L. R. A. 176.

8. The statute of frauds has no application to such a case as the present. To use the language of the Supreme Court of the United States, (Mr. Justice

Harlan, speaking for the court), Whitney v. Hay, 181 U. S. 77:

> "It is not arbitrary or unreasonable, said the Lord Chancellor in Madison v. Alderson, L. R. 8, Appeal Cases, 467-476, to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which *they* (this typographical error in original report) are equities resulting from *res gestae* subsequent to, and rising out of the contract."

9. There was here a grave irregularity by the officer making the sale. The judgment debtor was making profert of personal property, offering his check on a local bank—thus asking the sheriff to take an order on personal property (i. e., money) sufficient to cover the execution. The sheriff announces the sale of real estate must proceed. This act was against the mandate of the court in the execution,—*an irregularity making the sale void.*

10. That where there is gross inadequacy of price or any inadequacy of price, and the execution debtor is lulled to sleep by promises of being permitted to redeem after the time, then if he seeks to redeem as soon as he has a reason to believe that he has been the victim of misplaced confidence he will be permitted to do so.

11. If there is gross inadequacy of price, and there are any circumstances affecting the sale which sup-

pressed the bids, or had a tendency to suppress or influence adversely the bidding made by the buyer or by anyone else, the sale will be set aside and the privilege of redemption extended.

12. It was the statute law unto the sheriff that in selling four separate and distinct pieces of real estate, he offer them separately, and if he failed of bidders, then that he offer two separately, differentiating the allotments; failing of bids, he then would have been compelled to offer three at a time, differentiating the allotment again. This was not done, and there is no pretense that it was done.

This also rendered the sale fatally defective.

We have written at considerable length in this case. We extenuate the fault, if fault it be, that the case means little to the defendant and appellant; much to the appellee; in fact, in one view of the case it means nothing to the appellant, because, under the decree of the court he very properly was awarded all sums of money advanced, with the legal rate of interest for Montana, eight per cent. per annum, and this amount has been paid in to the clerk for him.

To the appellee it means that the fruits of his early toil and adventure, and the large expenditures which he made for the ground when he could afford to do so, are not to be wrested from him by the trickery of a friend, and the imposition upon his confidence in human nature.

From the record here the court can see the propriety of our quite unusual request,—an early decision. We

believe that this record shows the necessity of doing justice as speedily as the orderly conduct of the business of the court will permit. The appellee, as the record shows, has long since past the large allotment of three score years and ten. As shown in the bill, his health is bad.

Such is not the only reason. The record shows judgments obtained against the appellee, liens on this very property, costs accruing, and subject to sale at the hands of creditors whom he has always been willing to pay, and a decree of affirmance here would enable him to pay those who might levy and subject him to the additional chance of not being able to pay them because of the cloud still upon his title, and his inability to dispose of his property by reason of such cloud.

The decree, we believe, should be affirmed.

Respectfully submitted,

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MAURY, TEMPLEMAN & DAVIES,
of Butte, Montana,

Solicitors for the Appellee.

Service of the foregoing Brief admitted and copy received this ..... day of May, 1916.

.....,

.....,

Solicitors for the Appellant.